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Supreme Court of the United States

OCTOBER TERM 1941

No. 527

CARPENTERS AND JOINERS UNION OF AMERICA, LOCAL No. 213, et al.,

Petitioners,

vs.

RITTER'S CAFE, et al.

BRIEF ON BEHALF OF NEW YORK HOTEL TRADES COUNCIL, A. F. L., AND ILLINOIS STATE FEDERATION OF LABOR, *AMICI CURIAE*, IN SUPPORT OF APPLICATION FOR REARGUMENT

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We take it that on this application counsel are not expected to reargue the case as if reargument had been granted. Nor should the Court be burdened with a full argument of the entire case. This brief will, therefore, be limited strictly to pointing out why, in our opinion, a reargument should be granted.

Argument

A reargument should be granted, we respectfully submit, for the reason that the majority of the Court, in the decision handed down, proceeded upon an erroneous theory as to the main question that was before the Court for decision.

A reading of the opinion delivered by Mr. Justice Frankfurter indicates that the majority of the Court proceeded upon the theory that the question before the Court was as to the limits of permissible State action in a labor dispute.

But such was clearly not the case: The principal question, —if not the only one,—was as to the *nature of the means* which a State may employ in enforcing its policy, rather than as to its power generally in dealing with the subject of labor relations.

In other words, the question before the Court was and is: What, if any, are the constitutional limitations upon the choice of means by a State in the enforcement of its policy? Obviously, this is not the same question as that as to the limits of the competency of a State in declaring its policy with respect to labor relations,—which is the question with which the opinion of the majority of the Court deals. A State may have plenary powers to deal with the subject of labor relations,—in the sense of determining what is permissible for workers or their organizations to do without incurring liability to individuals or punishment by the State,—without being free to use a particular means of enforcing a policy which it was free to adopt. The constitutional limitations upon the policy, on the one hand, and those upon a principal means of enforcement, on the other, may depend upon different constitutional considerations.

This is such a case. The power to deal with labor relations is part of the general police power of the State,—using that term in its broad sense, in the classical formulation of Mr. Justice Taney, as "the power to govern men and things."

License Cases, 5 How. 503.

That the police power used in this comprehensive sense is not greater than when used in its narrow sense of providing for the "safety, health and good morals" of the community, is self-evident. Indeed, there are many things which the courts have held to be permissible in the latter sphere,—particularly in connection with the problem of "safety",—which would not be permissible in the sphere of ordinary governance. It is sufficient to point in this

connection to the cases arising under the federal Espionage Act passed during the last World War, and the cases arising under the so-called "criminal syndicalism" acts of various States. Those cases lay down certain limits to the freedom of speech and the press, dictated by the necessity to protect the "safety" of the nation or of the State, as the case may be. But no one would claim that those cases would warrant the institution of censorship either by the United States Government or by the government of any State.

It therefore follows, as a matter of course, that a State may not institute a *previous censorship* in order to enforce its ordinary powers to "govern men and things." But such, we respectfully submit, is the decree involved in this case. The correctness of that decree could not, therefore, be disposed of by a mere finding that the State had the power to declare the policy underlying that decree,—which is the purport of the opinion already rendered. The real question before the Court is: Assuming the power of the State to declare the policy underlying the decree, has the State the power to enforce it in the particular manner in which it sought to enforce it in the decree under review? And the answer to that question, we respectfully submit, must be in the negative.

POINT I

The question before the Court is not whether petitioners were free to do what they had been enjoined from doing, but whether the Texas court could *prevent* their action by *previous* order forbidding communication by the spoken or written word.

We respectfully submit that the majority of this Court, in the decision rendered, confounded the problem of whether or not the State of Texas could lay down a rule

whereby petitioners could not do the acts complained of without incurring *liability*, either to the defendant or to the State, with the problem whether the State could *forbid any communication by spoken or written word in order to prevent the thing for which petitioners would be liable under the declared policy of the State.*

In order to come to a proper decision in this case, it is, we respectfully submit, necessary to separate the problem as to what policy the State of Texas may adopt with respect to labor relations, from that of the means whereby it may *enforce* that policy. As we understand it, the Supreme Court of the State of Texas declared it to be either the statutory or common-law policy of that State that the owner of a restaurant who has no labor disputes with the employees of that restaurant, has a right to be free to enter into any contract he chooses with a building contractor, with respect to the erection of a building which has no relation to the conduct of the restaurant involved; and that a labor union composed of workers engaged in the building industry, has no right to invade that right, by appealing, either to the workers employed in the restaurant to quit work, or to the public not to patronize the restaurant. We assume, for the purpose of this argument, that there is nothing in the United States Constitution which would prevent the State of Texas from adopting such a policy. But the right to adopt such a policy is on an entirely different plane from the right to adopt *any means* of enforcing that policy. Such a policy might be enforced in at least three different ways:

1. The State might make labor unions, their members and officers, liable in damages to the party injured by conduct contrary to that policy.

2. The State might enact a penal statute declaring that whoever by word of mouth or in writing solicits, invites, or counsels another to violate the declared policy, is subject to fine or imprisonment.

3. The State might appoint a censor or board of censors, with power to censor all placards carried by pickets, prescribing punishment by fine or imprisonment for those carrying placards not approved by the censor or board of censors.

Obviously, the three methods of enforcing the declared public policy of the State are on different constitutional levels. We may assume that the first method would not be violative of any provision of the United States Constitution. Whether or not the second method would be violative of the constitutional guarantee against the abridgement of the freedom of speech or of the press, would probably depend on a number of factors which cannot be gone into here. We must, however, refer briefly to the basic principles involved, since there is some difference of opinion on the subject.

On the general question of the meaning of the constitutional guarantees against the abridgement of freedom of speech or of the press, there are two currents of thought, one of which may be called the English school, and the other the American school. Not that adherents of the one school are Englishmen, and those of the other Americans. Rather, the adherents of the first school believe that the guarantees contained in the American constitutions, including the Constitution of the United States, were intended to *preserve* inviolate the results which had been achieved in the course of centuries in the long struggle waged in England for freedom of speech and of the press; while the second school believes that the purpose of those guarantees was not merely to preserve but to *extend* the freedoms gained in England to new fields, and to establish the freedom of speech and of the press in this country on a level beyond that which had been achieved in England at the time of our Revolution. The law as it stood in England at the time of our Revolution was thus stated by Mr. Justice Blackstone:

"In this and the other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punlished by the English law, some with a greater, others with a less, degree of severity; the *liberty of the press*, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraint upon publications, and not in freedom from censure for criminal matters when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity."

Blackstone's Commentaries, Cooley's American Edition, Book IV, p. 151.

The American concept of freedom of the press was thus stated by Judge Cooley:

"Freedom of the press.—De Lolme, who wrote upon the Constitution of England just before the meeting of the Constitutional Convention, and who undertook to gather from the common law the meaning of this among other principles of liberty, has expressed his conclusion thus: 'The liberty of the press as established in England consists in this, that neither the courts of justice, nor any other judges whatever, are authorized to take notice of writings intended for the press, but are confined to those which are actually printed, and must in these cases proceed by the trial by jury.' Mr. Justice Blackstone adopted this view as undoubtedly correct, and in this country it has been accepted as expressing the views of those who framed and adopted this amendment. If it expresses their views fully, we must conclude that the amendment is aimed only at such censorship of the press as had sometimes been exercised in England, and to some extent in the Colonies also, and that, forbidding this, and leaving every one to publish what he might please, it left him, at the same time, to such responsibility for his publication as the law might provide.

It seems more than probable, however, that the Constitutional freedom of the press was intended to mean something more than mere exemption from censorship in advance of publication. Such censorship had never been general in the Colonies: It did not exist at all at the time of the Revolution, and there was no apparent danger of its ever being restored. To forbid it, therefore, and especially just at a time when the people had been taking a larger share in the government into their own hands, and when the command would be laid on their own representatives, would appear to savor somewhat of idle ceremony. But the history of the times shows that the people believed a right of publication existed which might be invaded and abridged by oppressive prosecution and by laws which admitted the liberty to publish, but enlarged beyond reason the sphere of responsibility; and the evils they feared had no necessary connection with any established or threatened censorship."

Cooley, Constitutional Law, 3rd Edition, Chapter XIV, Section V, Freedom of Speech and of the Press.[1]

This Court has never, as far as we know, expressed any opinion on the merits of the respective claims of these two schools of thought; although the decisions of this Court clearly indicate that it is the so-called "American doctrine" rather than the "English doctrine" that is the doctrine of our constitutional law. In this connection, it is well to refer to the opinion delivered by Mr. Justice Holmes on behalf of this Court in the well known case of *Patterson* v. *Colorado.* In that opinion, Mr. Justice Holmes said:

"In the first place, the main purpose of such constitutional provisions is to 'prevent all such *previous restraints* upon publications as had been practiced by other governments', and they do not prevent the sub-

[1] In this connection, Cooley's definition of "the press" should be noted. This is stated in the same work as follows:

"The freedom of the press is not limited to any particular form or method of publication, but it extends to all modes of putting facts, views, and opinions before the public. Books, pamphlets, circulars, etc., are therefore as much within it as periodical issues."

> sequent punishment of such as may be deemed contrary to the public welfare. Com. v. Blanding, 3 Pick. 304, 313, 314, 15 Am. Dec. 214; Republica v. Oswald, 1 Dall. 319, 325, 1 L. ed. 155, 158, 1 Am. Dec. 246."
>
> *Patterson* v. *Colorado*, 205 U. S. 454, 462.

It will be noted that Mr. Justice Holmes said that the prevention of previous restraints was the "main" purpose of the constitutional guarantees, but not their only purpose. Clearly, we have left Mr. Justice Blackstone behind, even though it is not quite clear how far forward we have gone.

POINT II

Texas cannot enforce its labor relations policy by instituting a censorship.

Whatever differences of opinion there may be as to the extent of the limitations put upon federal action by the First Amendment to the United States Constitution, and upon state action by the Fourteenth Amendment, it is clear that neither government can enforce any of its policies by instituting a censorship over the spoken or written word. Therefore—

Whatever the labor relations policy of Texas may be, it cannot enforce it instituting a censorship to prevent speech or writing contrary to that policy.

We take it that no one would dispute that point, when thus stated. But, clearly, if that point is not disputed, the majority opinion of the Court already rendered in this case, does not deal with the problem actually before the Court, and has not touched upon the point which *is* before the Court. In his opinion on behalf of the majority, Mr. Justice Frankfurter said:

> "In the circumstances of the case before us Texas has declared that its general welfare would not be served if, in a controversy between a contractor and

> building workers' unions, the unions were permitted to bring to bear the full weight of familiar weapons of industrial combat against a restaurant business, which, as a business, has no nexus with the building dispute but which happens to be owned by a person who contracts with the builder. The precise question is, therefore, whether the Fourteenth Amendment prohibits Texas from drawing this line in confining the area of unrestricted industrial warfare."

We respectfully submit that this is *not* the question before the Court. The question before this Court is not whether the State of Texas can declare the conduct of the petitioners tortious, so as to carry financial liability to the person injured, or criminal, so as to make those guilty of it liable to punishment by the State, but *whether it can prevent the action by establishing a censorship over the spoken or written word.* For it is only with respect to concededly improper or illegal use of speech or writing that the question of constitutional guarantees comes into play. And it is settled that whatever the limits of these constitutional limitations, *they unquestionably cover previous restraints.* Mr. Justice Holmes, speaking for this Court, said in the opinion already quoted from:

> *"The preliminary freedom extends as well to the false as to the true;* the subsequent punishment may extend as well to the true as to the false." (Italics supplied throughout, unless stated otherwise.)
>
> *Patterson* v. *Colorado,* 205 U. S. 454, 462.

It is thus clear that in order to be protected against preliminary restraint, action need not be in accord with public policy. For the constitutional protection applies not only to what is proper, but also to what is improper, and even to what is criminal.

Indeed, we doubt very much whether anyone would dispute this proposition if the Legislature of the State of Texas had done what the courts of that State have done in this case. The record in this case shows that—

"After the hearing of said cause on the trial on the merits, the trial court entered its decree thereon permanently enjoining the appellants from picketing or causing to be picketed, * * * and from carrying banners peacefully and in any other manner upon the sidewalks in front of 418 Broadway Street *with the words and inscriptions thereon as set forth in the Court of Civil Appeals findings of fact * * * and with any other words or inscriptions thereon*" (Record, p. 20).

Clearly, if the State of Texas had employed any other method, but that of a court decree, to prevent in advance the speaking or writing sought to be prevented by this decree, its unconstitutionality would have been self-evident. Does the fact that the attempt to *prevent* speech or writing is embodied in a court decree change the situation? We respectfully submit that it does not.

POINT III

What the state legislature cannot do, the state courts may not do.

It is settled law that the prohibitions of the Fourteenth Amendment with respect to what the States may not do apply equally to all state agencies, and that what a state legislature cannot do the state courts may not do.

Ex parte Virginia, 100 U. S. 339;
Neal v. *Delaware*, 103 U. S. 370;
Yick Wo v. *Hopkins*, 118 U. S. 356;
Scott v. *McNeal*, 154 U. S. 34;
Gibson v. *Mississippi*, 162 U. S. 565;
Chicago B. & Q. R. Co. v. *Chicago*, 166 U. S. 226.

In the last case cited this Court said:

"But it must be observed that the prohibitions of the Amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial au-

thorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that Amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state'. *This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it'.*"

Chicago B. & Q. R. Co. v. *Chicago,* 166 U. S. 226, 233.

See also:

No. Am. Cold Storage Co. v. *Chicago,* 211 U. S. 306;
Home T. & T. Co. v. *Los Angeles,* 227 U. S. 278;
Georgia Power Co. v. *Decatur,* 281 U. S. 505.

POINT IV

The prohibition in advance by injunction is censorship.

The general principle laid down by the cases just cited, to the effect that the courts of a State may not do what either the Legislature or any other state agency could not do, has been specifically and repeatedly applied by the courts to cases of injunctions. The rule that the courts will not enjoin a libel is familiar, but its very familiarity has largely obscured its source,—which is, that to enjoin the publication of a libel is violation of the principle against censorship, that the written or spoken word *may only be punished afterwards, but cannot be prevented in advance.* But there is at least one case that we know of in which this source of the rule is clearly stated; and the rule itself applied notwithstanding very serious considerations urged against its application in the particular case.

In a case which arose in the courts of the State of Missouri, the plaintiff sought to enjoin a course of action

on the part of the defendant which involved the repeated publication of scurrilous and libelous matter, and special reasons were urged for the granting of the injunction. The relief was denied by the court of first instance, and the decision was affirmed on appeal. In affirming the decision, the appellate court said:

> "No case is cited by the learned counsel for the appellant in which the jurisdiction here claimed has been exercised. All that they venture to suggest is that the various English courts which have refused to exercise such a jurisdiction have placed their refusal on grounds which do not make such refusal certainly apposite to the circumstances shown by the petition. The refusal has been uniform. The reasons assigned for it have been various, according to the peculiarities of the cases in which they were given. To argue from the qualifications of so many concurring refusals that it may be inferred that, but for the qualifications, the refusals would not have been made, would be an exceedingly unsafe line of argument anywhere. In Missouri, where we are expressly forbidden by the Constitution to assume the power we are asked by the plaintiff to exercise, our answer could not be doubtful. It is hardly necessary to quote the familiar language of our organic law, which has always declared 'that every person may freely speak, write, or print on any subject, being responsible for the abuse of that liberty'.
>
> If it be said that the right to speak, write, or print, thus secured to everyone, cannot be construed to mean a license to wantonly injure another, and that by the jurisdiction claimed it is only suspended until it can be determined judicially whether the exercise of it in the particular case be allowable, *our answer is that we have no power to suspend that right for a moment, or for any purpose. The sovereign power has forbidden any instrumentality of the government it has instituted to limit or restrain this right except by the fear of the penalty, civilly or criminally, which may wait on abuse.* The General Assembly can pass no law abridging the freedom of speech or of the press; it can only punish the licentious abuse of that freedom. *Courts of justice* can only administer the laws of the State, and, of course, *can do nothing by way of judicial*

sentence which the General Assembly has no power to sanction. The matter is too plain for detailed illustration."

Life Ass. v. *Boogher,* 3 Mo. App. 173, 179-180.

The principle that the courts cannot enjoin in advance any speech or writing, was enforced most emphatically in a notable case which arose in the courts of the State of California, in which the action of the court of first instance, in issuing such an injunction, was reversed by the highest court of the State. In that case, the lower court had issued an order enjoining the performance of a theatrical production based upon the facts of a case which was then pending in the criminal courts of the State. The action of the highest court of the State of California in that case in reversing that order is particularly significant, because the action complained of tended to interfere with the proper administration of justice, and, unquestionably, the courts could have punished the performance as a contempt of court. Nevertheless, the attempt to *prevent* in advance the threatened publication was considered an infringement upon the constitutional principle which does not permit *previous restraint* of publications, even though their nature be such that they could be punished *afterwards.* The point involved is thus stated in the headnote to the case:

"An order of the Superior Court forbidding the representation upon the theatrical stage of the facts of a criminal case, pending the trial of such case, is an infringement of Section 9, Article 1, of the Constitution of this State, which protects the right of the citizen to freely speak, write, and publish his sentiments, without censorship over him, he being responsible only at the hands of the law for an abuse of that right; and such order, being in excess of the jurisdiction of the Superior Court, will be annulled upon certiorari."

Dailey v. *Superior Court,* 112 Cal. 94.

And in the opinion in that case, the Supreme Court of California said:

"The production of a tragedy or comedy upon the theatrical stage is a publication to the world by word of mouth of the text of the author, and, as to the question here presented for our consideration, it is immaterial whether the words be publicly spoken from the stage or upon the hustings, or go out to the world through the channels of the printing press. By the constitutional provision we are about to invoke a citizen may speak, write, or publish his sentiments with equal freedom, and this case now stands before us exactly as though one of the daily journals was threatening to publish its sentiments pertaining to the conduct of a criminal trial then pending, and the court where such trial was pending and in progress, believing such publication would interfere with the due administration of justice, had issued an order restraining and prohibiting the threatened action of the paper.

We are entirely clear that the court had no jurisdiction to make the order which forms the basis of this proceeding, for such order was an attempted infringement upon rights guaranteed to every citizen by Section 9, Article 1, of the Constitution of this State. That Section provides: 'Every citizen may speak freely, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.' The wording of this Section is terse and vigorous, and its meaning so plain that construction is not needed. The right of the citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. He shall have no censor over him to whom he must apply for permission to speak, write, and publish, but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes. *It is patent that this right to speak, write, and publish, cannot be abused until it is exercised, and before it is exercised there can be no responsibility. The purpose of this provision of the Constitution was the abolishment of censorship, and for courts to act as censors is directly violative of that purpose.*"

Dailey v. *Superior Court*, 112 Cal. 94, 96-97.

And in support of the proposition that the prohibition against censorship applies to the courts as well as to other organs of the State, the Court cited the following from Mr. Justice Story's work on the Constitution:

> "Indeed, the liberty of the press, as understood by the law of England, is the right to publish without any previous restraint or license; so that *neither the courts of justice* nor other persons are authorized to take notice of writings intended for the press; but are confined to those which are printed."
>
> *Story on the Constitution,* Section 1885.

And in another case which arose in the courts of the State of Missouri the principle was applied to a labor case. In that case, an injunction was obtained by an employer against a labor union, on a principle similar to the one upon which the decree under consideration was granted by the Texas court. In reversing the decree granting the injunction, the Supreme Court of Missouri quoted the following from Judge Cooley's work on Constitutional Limitations:

> "It is also sometimes expressly declared—what indeed is implied without the declaration—that everything in the declaration of rights contained is excepted out of the general powers of government, and all laws contrary thereto shall be void. * * * While they continue in force they are to remain absolute and unchangeable rules of action and decision."
>
> *Cooley's Const. Lim.* (6 Ed.), p. 48.

It then proceeded to say:

> "The rights then set forth and designated in Section 14 are '*excepted out of the general powers of the government;* all laws contrary thereto are void, and so long as such provisions of the Bill of Rights continue in force they remain absolute and unchangeable rules of action and decision.' And, as the learned author and eminent jurist just quoted says in another place with great force: 'The securities of individual right

• • • cannot be too frequently declared, nor in too many forms of words; nor is it possible to guard too vigilantly against the encroachments of power nor to watch with too lively a suspicion the propensity of persons in authority to break through the cob-web chains of paper Constitutions.' (2 Story's Const. [Cooley's Ed.], Sec. 1938.) • • •

Section 14, supra, makes no distinction and authorizes no difference to be made by courts or legislatures between a proceeding set on foot to enjoin the publication of a *libel*, and one to enjoin the *publication of any other sort or nature, however injurious it may be*, or to prohibit the use of free speech or free writing on any subject whatever; because wherever the authority of *injunction begins*, there the right of free speech, free writing or free publication *ends*. No halfway house stands on the highway between *absolute prevention* and *absolute freedom*. The rights established by Section 14 can neither be impaired by the legislature, nor hampered nor denied by the courts." (Italics in the original.)

Marx & Haas Jeans Clothing Company v. *Watson*, 168 Mo. 133, 145, 149.

CONCLUSION

It is therefore clear that the question of the right of the State of Texas to set a limit to the right of the labor union and its members with respect to parties claiming not to be involved in a labor dispute, does not include the right of its courts to prohibit in advance, by a decree, any speech or writing which contravenes its policy in that regard. The latter question, which is the only question before this Court, depends upon entirely different principles. And a consideration of those principles, and of the adjudicated cases dealing with the same, would, we respectfully submit, establish that the decree appealed from is in the nature of censorship, and therefore offends the guarantees contained in the United States Constitution against the infringement of the freedom of speech and of the freedom of the press by the States. Reargument is therefore clearly called for.

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